

11044304828

Caplin & Drysdale
ATTORNEYS

Caplin & Drysdale, Chartered
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
202-662-5000 202-428-3301 Fax
www.caplindrysdale.com

December 6, 2010

VIA ELECTRONIC MAIL AND COURIER

Christopher Hughey
Acting General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
2010 DEC -7 PM 12:01
OFFICE OF GENERAL
COUNSEL

Re: Response to Complaint in MUR 6403

Dear Mr. Hughey:

Please find enclosed the response of Arctic Slope Regional Corporation to the complaint filed by Joe Miller for U.S. Senate in Matter Under Review 6403. Should you have any questions concerning this response, please feel free to contact me.

Sincerely,


Trevor Potter

Enclosure: Response of Arctic Slope Regional Corporation
Affidavits
Copy of U.S. Government Lease for Real Property, GS-10B-06783

**RESPONSE OF ARCTIC SLOPE REGIONAL CORPORATION TO JOE MILLER
FOR U.S. SENATE'S COMPLAINT IN MATTER UNDER REVIEW**

70 DEC -7 PH 12: 01

OFFICE OF GENERAL
COUNSEL

I. INTRODUCTION

Joe Miller for U.S. Senate ("Miller") recently filed a politically motivated complaint against twelve Alaska Native Corporations. One of these Alaska Native Corporations, Arctic Slope Regional Corporation ("ASRC"), responds here to Miller's false accusations.

Miller's assertion is that ASRC's contributions to Alaskans Standing Together, a federally registered independent expenditure-only committee that opposed Miller in the 2010 general election, violated 2 U.S.C. § 441n(a)'s ban on federal contractors giving funds "for any political purpose or use."¹ But as discussed below, the U.S. Supreme Court recognized earlier this year in *Citizens United* an unfettered constitutional right for domestic corporations to make unlimited "independent expenditures," meaning that ASRC and its Alaska Native shareholders may voice their opinions on elections, independent from federal candidates and parties. ASRC also falls outside the scope of 2 U.S.C. § 441c(a)'s ban because it should not be categorized as a federal contractor. The Commission should therefore find no reason to believe that a violation occurred and should dismiss this Matter.

II. STATEMENT OF FACTS

ASRC is incorporated under state law and formed pursuant to the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), a federal law that extinguished aboriginal claims within the State of Alaska between Alaska Natives and the federal government.²

ASRC represents the business interests of Iñupiat Eskimos from the North Slope of Alaska, which is the region located on the northern slope of the Brooks Range along the coast of the Arctic Ocean.³ The businesses of ASRC and its subsidiaries include energy services, construction, petroleum refining, aerospace, and tourism operations.⁴

Shortly before the 2010 general election, ASRC decided to exercise its constitutional right recognized in *Citizens United* and make contributions received by Alaskans Standing

¹ Miller accuses ASRC of violating the Byrd Amendment (31 U.S.C. § 1352) and rules under the Federal Acquisition Regulation (FAR). These accusations are false and also plainly fall outside the Commission's jurisdiction. 2 U.S.C. § 437c(b). Therefore, this Response does not further address these elements of the complaint.

² Mellinger Aff. at ¶ 2. Please note that ASRC is not "organized by authority of any law of Congress" for purposes of 2 U.S.C. § 441b(a)'s prohibitions. Fed. Election Comm'n Adv. Op. 1982-28 at 4.

³ Mellinger Aff. at ¶ 2.

⁴ Mellinger Aff. at ¶ 2. ASRC has subsidiaries that are separate "persons" under federal campaign finance laws. Therefore, this Response does not further address these subsidiaries' activities in detail. See Fed. Election Comm'n Adv. Ops. 2005-01, 1999-32, 1998-11, 1995-31.

Together, an independent expenditure-only committee. On September 30, 2010 ASRC made a contribution in the amount of \$140,000. Subsequently, on October 27, 2010, ASRC made an additional contribution in the amount of \$60,000.⁵ Each of these contributions was made by and attributable to ASRC exclusively.⁶

Alaskans Standing Together fully and timely disclosed ASRC's contributions, and used them to facilitate and sponsor independent communications that criticized Joe Miller, a candidate in Alaska's U.S. Senate race.⁷

ASRC had sufficient revenue derived from sources other than the federal government to make these contributions to Alaskans Standing Together. For the fiscal year ended December 31, 2009, ASRC received approximately \$103.6 million and recorded earnings of approximately \$32.9 million attributable to the development of natural resources, which development is unrelated to federal government contracting. Overall, approximately \$1.128 billion of ASRC's consolidated revenue for the fiscal year ended December 31, 2009 is attributable to activities and operations of ASRC and its subsidiaries that are not related to federal government contracting.⁸

In December 2010, ASRC became aware of a \$2,400-per-month lease between it and the federal government for the Transportation Security Administration ("TSA") to rent a small 800-square-foot space in Barrow, the northernmost city in the United States, which is located in a remote region of Alaska.⁹ ASRC has learned that the federal government approached ASRC in November 2002 to explore a lease arrangement whereby office space could be rented for the TSA in ASRC's Barrow office building.¹⁰ The federal government requested that ASRC rent this space because the ASRC office building is perhaps the only practical option for office space that would meet the many government requirements set forth in rules, regulations, and lease terms and conditions.¹¹ Thus, ASRC could either rent the space to the TSA or perhaps deny the TSA an office presence to the detriment of the Barrow community.

The ASRC personnel who decided to make the contributions to Alaskans Standing Together were not aware of the lease at the time of the contributions.¹² The lease was not discovered earlier for three primary reasons: (1) the lease was listed in ASRC's records as a lease with another entity; (2) the individual who was primarily responsible for responding to

⁵ Mellinger Aff. at ¶ 3.

⁶ Mellinger Aff. at ¶ 3.

⁷ See e.g., Alaskans Standing Together, FEC Pre-General Report (filed on Oct. 21, 2010).

⁸ Mellinger Aff. at ¶ 4.

⁹ Mellinger Aff. at ¶ 5; Contrades Aff. at ¶ 3. See also U.S. Government Lease for Real Property GS 10B-06783 (copy attached).

¹⁰ Mellinger Aff. at ¶ 5; Contrades Aff. at ¶¶ 2, 4.

¹¹ Contrades Aff. at ¶ 4.

¹² Mellinger Aff. at ¶ 6.

11044304830

the government's request for the lease is no longer employed by ASRC; and (3) the lease was an isolated arrangement, as ASRC does not market itself as a lessor to federal-government entities.¹³

The proceeds from this single lease with the federal government represents approximately 0.0015 percent of ASRC's consolidated gross revenue for the fiscal year ended December 31, 2009.¹⁴ Other than this lease for the Barrow office space, ASRC has not entered into any other arrangement under which it receives direct payment from the federal government.¹⁵

III. ARGUMENT

Miller wrongly claims that ASRC's contributions to Alaskans Standing Together violated 2 U.S.C. § 441c(a), which declares it unlawful for any person "who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment... or for selling any land or building" to contribute funds "to any political, committee, or candidate for public office or to any person for any political purpose or use."¹⁶

Miller is mistaken for at least two reasons. First, basing ASRC's contributions to Alaskans Standing Together in this context would violate fundamental First Amendment rights recently articulated in *Citizens United*. Second, ASRC should not be classified as a federal contractor.

A. ASRC and Its Alaska Native Shareholders Exercised Their Constitutional Right to Independently Voice Their Opinions on Elections by Contributing to Alaskans Standing Together

ASRC and its Alaska Native shareholders possess a constitutional right to independently voice their opinions on elections that would trump 2 U.S.C. § 441c(a)'s potential prohibition.

The Supreme Court has held that corporations possess a First Amendment right to free speech, and restrictions on that right are warranted only where the government advances a "compelling interest."¹⁷ In *Citizens United*, the Court considered the constitutionality of 2 U.S.C. § 441c(a)'s sister provision, a ban on corporations making federal political expenditures independently from candidates and parties.¹⁸ The Court found that "independent

¹³ Mellinger Aff. at ¶ 6.

¹⁴ Mellinger Aff. at ¶ 7.

¹⁵ Mellinger Aff. at ¶ 7.

¹⁶ 2 U.S.C. § 441c(a). See also 11 C.F.R. § 115.2.

¹⁷ *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 899-900 (2010).

¹⁸ See 2 U.S.C. § 441b.

expenditures do not lead to, or create the appearance of, *quid pro quo* corruption," which had served as a "compelling interest" in previous cases.¹⁹ Further, the Court rejected the suggestion that "the corporate identity of the speaker" caused the speaker's independent speech to corrupt, or appear to corrupt, the government process.²⁰ Put differently, the Court was categorical in its treatment of independent expenditures, saying "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."²¹ The Court therefore found that preventing corruption and the appearance of corruption is not a "compelling interest" for government restrictions on independent speech, regardless of the speaker's identity.²²

ASRC made "independent expenditures" by contributing to Alaskans Standing Together, an independent expenditure-only committee.²³ Independent expenditures, by definition, cannot "lead to, or create the appearance of, *quid pro quo* corruption." Because ASRC's underlying activities are incapable of causing corruption or the appearance of corruption, anti-corruption aims are not a "compelling interest" sufficient to validate 2 U.S.C. § 441c(a)'s ban on independent speech.²⁴

Other potential "compelling interests" that might justify 2 U.S.C. § 441c(a)'s prohibition on independent speech are not applicable to ASRC's funding of independent expenditures.²⁵ "[P]reventing foreign individuals or associations from influencing our Nation's political process"²⁶ may be a "compelling interest," but ASRC is a domestic corporation.²⁷ The federal government could perhaps regulate the independent speech of a

¹⁹ *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 910 (2010) (referencing *Buckley v. Valeo*, 424 U.S. 1, 47).

²⁰ See e.g., *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 910 (2010) (stating that "The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker."); *Id.* at 885 ("The Court returns to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech based on the speaker's corporate identity.").

²¹ *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 909 (2010). See also *SpeechNow v. Fed. Election Comm'n*, 599 F.3d 686, 693 (D.C. Cir. 2010).

²² See *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 911 ("Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.").

²³ See Fed. Election Comm'n Adv. Op. 2010-09 at 4. See also *SpeechNow v. FEC*, 599 F.3d, 686, 693 (D.C. Cir. 2010).

²⁴ Congress plainly agrees with this reading of *Citizens United*. The U.S. House of Representatives, for example, passed earlier this year a bill to reinstate the federal contractor prohibition on independent spending after it fell in *Citizens United*. See H.R. 5173, DISCLOSE Act sec. 101 (2010). Legislation that includes an identical provision is currently pending in the U.S. Senate. See S.3628, DISCLOSE Act sec. 101 (2010).

²⁵ Please note that the *Citizens United* Court already rejected the possible "compelling interests" of protecting shareholders and preventing "distortion" in the electoral process. *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 904, 911 (2010).

²⁶ *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 911 (2010). See also *Brazzrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

²⁷ *Mellinger Aff.* at ¶ 2.

11044304833

congressionally chartered bank or corporation,²⁸ but ASRC is not a congressionally chartered entity.²⁹ And the government could conceivably justify restrictions on using federally appropriated funds for independent political speech, but ASRC did not provide federally appropriated funds to Alaskans Standing Together.³⁰

In sum, 2 U.S.C. § 441c(a) is void to the extent it is read to restrict ASRC's sponsorship of independent expenditures because no "compelling interest" undergirds the provision in this context. *Citizens United* found that anti-corruption aims cannot justify independent-speech restrictions. Other potential "compelling interests" are simply not implicated here. ASRC and its Alaska Native shareholders possess a constitutional right to use non-appropriated funds to independently voice their opinions on elections. This right cannot be wrested away, particularly on account of a single \$2,400-per-month lease.

B. ASRC's Contributions to Alaskans Standing Together Were Permissible Because ASRC Should Not Be Classified as a Federal Contractor

In addition to the constitutional protections afforded ASRC, the company's contributions were permissible because ASRC should not be classified as a federal contractor.

ASRC is not a federal contractor because leases are not among the types of contractual arrangements covered under the statutory and regulatory definitions.³¹ Commission rules, which follow statutory language, state that a "federal contractor" is a person who enters into any contract with the federal government for the: (1) rendition of personal services"; (2) furnishing of any materials, supplies, or equipment; or (3) selling of any land or buildings.³² In the past, the Commission has held that a contractual arrangement outside these enumerated categories does not trigger federal contractor status if it primarily benefits the public.³³ The Commission has reason to make a similar finding here as well. While ASRC received rental payments, this benefit was a pittance relative to ASRC's consolidated annual revenue.³⁴ And ASRC was, in some sense, a lessor of last resort for the TSA.³⁵ Suitable office space is scarce

²⁸ See 2 U.S.C. § 441b(a).

²⁹ Fed. Election Comm'n Adv. Op. 1982-28 at 4 (concluding that Sealaska, another Alaska Native Corporation "is not a corporation 'organized by authority of any law of Congress' and is not subject to the prohibitions imposed by 441b(a) on national banks and corporations which are organized by authority of Congress.").

³⁰ Mellinger Aff. at ¶¶ 3, 4.

³¹ In Advisory Opinion 1984-53, the Commission equates leases to "sales" for purposes of 2 U.S.C. § 441c without attempting to account for the exclusion of leases from the text or for possible relevant distinctions between leases and sales. This Advisory Opinion should therefore not be mechanically applied to ASRC's situation.

³² 11 C.F.R. § 115.1(a).

³³ Fed. Election Comm'n Adv. Op. 1993-12.

³⁴ Mellinger Aff. at ¶ 7.

³⁵ Contreras Aff. at ¶ 4.

11044304834

in Barrow, a small city on Alaska's Arctic Coast.³⁶ In responding to the government's requests, ASRC was in the position of either renting the space or potentially denying the Barrow community a fully functioning TSA office presence.³⁷ If the Commission deems ASRC a "federal contractor" here, it would thrust upon ASRC another, perhaps more difficult decision—either cease all election-related speech in the future or evict the TSA and possibly weaken the Administration's presence in Barrow.

ASRC should also not be categorized as a federal contractor because its contracting activity is *de minimis*. The Federal Election Campaign Act and Commission rules have, in the past, been interpreted so that regulatory burdens are not imposed on persons who only nominally fit criteria that trigger regulation.³⁸ The Commission should continue with that approach and apply it here. ASRC triggers "federal contractor" status, if at all, due to a single \$2,400-per-month lease. The payments ASRC receives under the lease represented 0.0015 percent of ASRC's consolidated gross revenue for the fiscal year ended December 31, 2009.³⁹ ASRC does not market itself as a lessor to federal entities, and negotiations for this lease were initiated by the government.⁴⁰ In fact, this lease was such an insignificant portion of ASRC's operations that key executives were unaware of its existence until only recently.⁴¹ And ASRC has otherwise avoided making any arrangement under which it receives direct payment from the federal government.⁴² ASRC is, then, much more analogous to an entity that does not hold any federal contracts and should be treated as such by the Commission.

IV. CONCLUSION

Miller's flawed complaint fails to show that ASRC violated federal law. ASRC and its Alaska Native shareholders are constitutionally guaranteed the right to voice their opinions on elections, independent of candidates and parties. ASRC also falls outside the scope of 2 U.S.C. § 441c(a)'s ban because it should not be categorized as a federal contractor. The Commission should therefore find no reason to believe that a violation occurred and should dismiss this Matter.

Respectfully Submitted,


Trevor Potter

³⁶ Mellinger Aff. at ¶ 5; Contades Aff. at ¶ 4.

³⁷ Contades Aff. at ¶ 4.

³⁸ See *Buzinley v. Vuleo*, 424 U.S. 1, 79 (1976) (stating that an entity is subject to federal campaign finance regulations if its "major purpose" is influencing federal regulations).

³⁹ Mellinger Aff. at ¶ 7.

⁴⁰ Mellinger Aff. at ¶ 6; Contrades Aff. at ¶¶ 2, 4.

⁴¹ Mellinger Aff. at ¶ 5.

⁴² Mellinger Aff. at ¶ 7.